Date of Hearing: May 11, 1999

ASSEMBLY COMMITTEE ON JUDICIARY
Sheila James Kuehl, Chair
AB 1670 (Judiciary Committee) – As Amended: May 6, 1999

SUBJECT: DISCRIMINATION: CALIFORNIA CIVIL RIGHTS AMENDMENTS OF 1999

KEY ISSUE: SHOULD VARIOUS CIVIL RIGHTS STATUTES BE AMENDED TO STRENGTHEN DISCRIMINATION PROTECTIONS OR CLARIFY AMBIGUITIES IN THE LAW?

SUMMARY: Strengthens and clarifies various civil rights protections afforded by the Fair Employment and Housing Act (FEHA) and other civil rights statutes. Specifically, this bill, among other things:

1) Increases the amount of damages and administrative fines that may be awarded by the Fair Employment and Housing Commission in employment discrimination cases from $50,000 to $150,000, and permits a court to award expert witness fees to a prevailing party in FEHA cases.

2) Extends harassment protections under FEHA to contract workers.

3) Requires employers to provide reasonable accommodations to pregnant employees, clarifies that genetic testing of employees is prohibited, and expands the class of employers subject to FEHA's prohibition against discrimination on the basis of mental disability.

4) Clarifies that protections against housing and employment discrimination cover discrimination based upon a victim's perceived membership in a protected class, and clarifies that FEHA's protections against housing and employment discrimination cover the right to freely associate.

EXISTING LAW:

1) Prohibits business establishments from discriminating against, boycotting or blacklisting, or refusing to buy from, sell to, or trade with, any person because of the race, creed, religion, color, national origin, sex, or disability of that person or the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers. (Civil Code section 51.5, the Unruh Civil Rights Act.)

2) Does not prohibit business establishments from discriminating against, boycotting or blacklisting, or refusing to buy from, sell to, or trade with any person because of their perceived membership in a class protected under the Unruh Civil Rights Act; nor does it include the "refusal to contract with another" as one of the prohibited types of discrimination protected under the Act. (Civil Code section 51.5.)

3) Provides that the Department of Fair Employment and Housing (the Department) shall respond to complaints of discriminatory practices by employers and owners of housing accommodations by

undertaking investigations and by carrying out appropriate enforcement measures. (Government Code section 12940 et. seq., FEHA. All further references are to this code unless otherwise noted.)

4) Provides that the combined amount of damages and administrative fines that may be awarded by the Fair Employment and Housing Commission in employment discrimination cases is capped at $50,000. (Section 12970 (a)(3).) However there is no cap at all on the amount of damages that may be awarded by the Commission in housing discrimination cases. (Section 12987(a).)

5) Provides, in federal actions, that a prevailing party may recover an award "of reasonable attorney's fees (including expert witness fees) as part of recoverable costs." (Civil Rights Act, Title 42 U.S.C., 2000(e)(5)(k).) However, expert witness fees are not awarded in state FEHA cases as an item of costs to prevailing parties. (Davis v. KGO (1998) 17 Cal.4th 436.)

6) Protects employees, under FEHA, but not independent contractors, from discriminatory employment practices. (Section 12940.)

7) Makes it an unlawful employment practice for employers, including employer agents, among others, to harass an employee or applicant on the basis of various protected characteristics. (Section 12940.)

8) Provides that harassment of an employee or applicant by anyone other than an employer, agent or supervisor is unlawful only if the employer, or any agents or supervisors, knows or should have known of the harassment and fails to take immediate and appropriate corrective action. (Section 12940.) However FEHA does not define the term "supervisor" for purposes of liability under the Act.

9) Makes it an unlawful employment practice for an employer to refuse to transfer a pregnant female employee, upon her request, to a less strenuous or hazardous position for the duration of her pregnancy. (Section 12945(a),(e).)

10) Provides that employers of five or more employees are generally subject to FEHA's discrimination prohibitions. (Section 12926(d).) However, only employers of fifteen or more employees are subject to FEHA's prohibition against discrimination on the basis of mental disability. (Section 12926(d)(2).)

11) Declares as a civil right the opportunity to seek, obtain, and hold employment without discrimination on specified bases. (Section 12921.) However FEHA does not expressly state that its protections against housing and employment discrimination cover associational rights. (Section 12940 et seq.)

12) Does not expressly state that the prohibition against discrimination by agencies or entities receiving state funds is enforceable through a civil action for equitable relief. (Section 11139.)

13) Authorizes the court in actions brought under FEHA to grant any relief normally available to courts in civil actions. In addition, the court may order any other relief in FEHA cases that, "in the judgment of the court, will effectuate" the purpose of the Act. (Section 12965 (c)(3).)

FISCAL EFFECT: Unknown

COMMENTS: This bill contains many of the provisions that comprised the Chairperson's AB 310 of last year. That comprehensive civil rights legislation was passed by the Legislature and vetoed by then-Governor Wilson due to concerns about the bill's harassment protections for contract workers. Like AB 310, this bill seeks to strengthen and clarify a host of key civil rights protections contained in FEHA and other civil rights statutes. The proposed changes continue to incorporate recommendations made by a broad coalition of the state's housing, labor, disability, civil rights, and employment law experts and organizations. Many of the proposals are taken from existing federal law or regulations in the areas of housing and employment, and, as noted, many have already been approved by the Legislature in prior sessions.

It is the Committee's goal with this legislation to provide California employers with clearer guidance about the Legislature's intent regarding particular provisions of state discrimination laws. It also seeks to better harmonize federal and state employment laws in these areas to facilitate the "vigorous enforcement" of our anti-discrimination laws to which the Legislature has long been committed.

Following are the Committee's explanations of, and rationales for, the principal provisions of the legislation:

Expanded Damages Under FEHA: The bill increases the amount of damages and administrative fines that may be awarded by the Fair Employment and Housing Commission (the Commission) in employment discrimination cases from $50,000 to $150,000. As noted above, there is already no cap at all on the amount of damages that may be awarded by the Commission in housing discrimination cases. (Section 12987(a).)

This proposed increase of the damages and fines cap in employment cases was approved by the Legislature in 1991 in SB 827 (Bergeson-R) which would have given the Commission the statutory authority to assess actual damages up to $150,000. However, then-Governor Wilson vetoed that legislation. This provision was approved again by the Assembly last year in AB 310 (Kuehl), and a broader provision (eliminating the cap entirely) was approved by the Senate last year in SB 1251 (Calderon).

The goal of increasing the amount of damages available under FEHA is to provide the Commission with the ability to more reasonably compensate victims of employment discrimination or harassment. Lawsuits involving employment claims have been steadily on the rise. Some estimates put the increase in employment discrimination cases at greater than 2000% over the past twenty years. (See John J. Donohue III and Peter Siegelman, The Changing Nature of Employment Discrimination Litigation , 43 Stan. L. Rev. 983 (1991).) A large portion of these cases involve allegations of discrimination or harassment, or both.

It is hoped that this augmentation in available damages that may be awarded by the Commission under FEHA will make resolution of discrimination complaints via the administrative process rather than court more attractive to plaintiffs. By raising the cap on damage awards in employment discrimination cases,

the Committee hopes to encourage more plaintiffs to choose the less cumbersome, and less expensive, option of administrative action over the more lengthy and costly court option.

To assist in the evaluation of the merits of this important provision, as well as provide some general background on FEHA, a brief recap of the history behind FEHA's treatment of compensatory damages follows.

FEHA: California's analog to the federal Civil Rights Act of 1964 (42 U.S.C. 2000e to 2000e-17 (1994), otherwise known as Title VII, is the Fair Employment and Housing Act (Government Code section 12940 et seq.), called FEHA. This Act provides similar remedial protection from employment discrimination as Title VII. As with Title VII, the dual purposes of eliminating employment discrimination and compensating victims of discrimination led to the enactment of FEHA. (County of Alameda v. FEHC (1984) 200 Cal.Rptr. 381.) FEHA is also similar to Title VII in that it is an unlawful employment practice for an employer to discriminate on the basis of a detailed list of protected categories.

However, FEHA also fills significant gaps that over time became apparent under the federal law. For example, the California law prohibits discrimination on the basis of physical handicap by most private as well as public employers. Moreover, the scope of damages, especially for private litigants, is considerably broader under FEHA than the federal law. As with Title VII, enforcement of FEHA's discrimination protections may be pursued in two different arenas: 1) through the administrative process before the Fair Employment and Housing Commission (the Commission), or 2) through a civil suit filed in superior court.

No Cap on FEHA Damages for Housing Discrimination Cases. In civil court, there is no limit upon the damages a plaintiff may seek for employment or housing discrimination claims. However, in the administrative process provided under FEHA there currently is a $50,000 cap on the actual damages and administrative fines the Commission may award for employment discrimination claims. Importantly for purposes of this legislation (which raises the cap on actual damages in employment cases), there is no similar cap on actual damages in housing discrimination cases under FEHA. In 1992, then-Governor Wilson signed SB 1234 (Ch. 182, Stats. 1992) completely eliminating any cap on actual damages in housing claims brought under FEHA. (Section 12987(a)(4).) This action reflected recognition by the Legislature and Governor of the seriousness of housing discrimination. There is thus precedent for considering similar, though less ambitious, legislative action vis-a-vis employment discrimination claims.

Initial Efforts to Raise the $50,000 Cap: During the 1980s, the Commission awarded compensatory damages without any limiting cap. However, this practice was summarily halted by the California Supreme Court in Peralta v. FEHC (52 Cal.3d 1379) in 1990, when the Court held that the Commission lacked express legislative authority to award compensatory damages in employment discrimination cases. (In an earlier case, Dyna-Med v. FEHC (1987) 43 Cal.3d 1379, the Court determined under a similar rationale that the Commission lacked the authority to award punitive damages.) In 1991, then-Governor Wilson vetoed legislation, SB 827 (Bergeson-R) which, as noted above, would have similarly given the Commission the statutory authority provided in this legislation to assess actual damages up to $150,000. That same year, the Court again ruled that the Commission lacked the authority to award compensatory damages, this time in a housing discrimination case. (Walnut Creek Manor v. FEHC (1991) 54 Cal.3d 245.)

In response to this ruling, the Legislature passed and the Governor signed AB 311 (Moore), Ch. 911, Stats. 1992, to provide the Commission constitutional authority to award compensatory damages under FEHA, capped at $50,000. However, even as then-Governor Wilson signed AB 311, proponents of the reform expressed deep concern that the $50,000 cap would be insufficient to serve the "make whole" purpose of FEHA. Therefore the Legislature required, by the same statute, that the Commission report back by January 1, 1995, to the Legislature on the "adequacy of the amount available to compensate victims of discrimination and administrative fines" permitted by AB 311.

The 1995 Commission Report on FEHA Damages. The 1995 Commission report provided important support for at least raising the $50,000 cap on damages and administrative fines by stating that:

> The [current] $50,00 ceiling may ... have the unintended effect of encouraging complainants to file civil actions in the courts rather than making use of the administrative forum. A primary reason for authorizing the Commission to award emotional distress damages and administrative fines was to encourage FEHA litigants to remain in the administrative forum, which is generally more timely and less costly to parties than court litigation. Because the $50,000 ceiling is relatively low compared to the five-, six-, and even seven-figure awards sometimes ordered in FEHA court suits, complainants may be inclined to take their cases to court rather than stay in the administrative forum. Thus, it may be appropriate to consider raising the ceiling.

This legislation incorporates the Commission's four-year-old suggestion, and Senator Bergeson's eight-year old effort, to raise the cap on available damages and fines from $50,000 to $150,000. According to the Committee, this amendment to FEHA will permit the Commission to more adequately "make whole" victims of employment discrimination, while retaining a more reasonable cap on available damages in the administrative context.

Expert Witness Fees: In addition to this change in available damages under FEHA, the bill also permits the court to award expert witness fees to a prevailing party. As noted above, the federal counterpart to FEHA is Title VII, which expressly permits the award of expert witness fees as part of the reimbursement of costs available to a prevailing party. (Section 2000e-5(k) of Title VII.) However, expert witness fees are not presently included as a part of costs. In addition, a recent California Supreme Court decision (Davis vs. KGO (1998) 17 Cal. 4th 436) held that FEHA did not explicitly authorize recovery of expert witness fees.

This bill therefore amends FEHA to provide, like its federal counterpart, that expert witness fees may be awarded to the prevailing party. This approach is also consistent with the approach FEHA already takes regarding attorney's fees and court costs; the Act permits a court in any civil action brought under FEHA to award, with certain exceptions, the prevailing party reasonable attorney's fees and costs. (Government Code sections 12965 and 12989.2.)

New Harassment Protections for Contract Workers: In addition to addressing the damages and costs available under FEHA, this legislation expands the reach of the state's harassment (but not discrimination) protections by including contract workers within FEHA's coverage. Currently, FEHA

applies to all California employees and applicants for employment, including persons compensated by temporary service agencies. (Government Code section 12940(a).) For purposes of the Act, "employee" is defined as "Any individual under the direction and control of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written…" (2 Cal. Code Reg. Section 7286(h).)

However, the Act expressly excludes from its reach independent contractors, as defined in Labor Code Section 3353, governing workers' compensation. (2 Cal. Code Reg. Section 7286.5(b)(1).) Under this provision, an "independent contractor" is any person who renders service for compensation, for a specified service or product. The contractor is under the control of a principal regarding only the result of the work, and not regarding the means by which the result is accomplished. (Labor Code 3353.) This view, that FEHA's harassment protections do not currently apply to independent contractors, was recently reiterated by the court of appeal in Fischer v. San Pedro Peninsula Hosp. (1989) 214 Cal.App.3d 590, 608-609 n.6.) The view is also consistent with the decision by the court of appeal in Sistare-Meyer v. YMCA (1997) 58 Cal.App.4th 10 (review denied January 21, 1998), where the court held that people who work as independent contractors do not have the same rights as regular employees and cannot sue for wrongful termination in violation of public policy. This bill would therefore extend FEHA's harassment protections to independent contractors.

In addition, there already is important precedent in California law for protecting independent contractors from harassment. Civil Code section 51.9 broadly protects non-employees from sexual harassment, which may include contract workers, whenever "there is a business, service, or professional relationship between the plaintiff and defendant" and the defendant sexually harasses the plaintiff. (Civil Code section 51.9 (a)(1).)

This bill therefore amends FEHA, consistent with Civil Code section 51.9, to add individuals in California who are "under the control of a principal regarding only the result of [their] work, and not regarding the means by which [their work] is accomplished." This change is intended to provide needed protections for the ever-growing numbers of workers who are hired as independent contractors rather than employees, and who currently work unprotected against harassment simply by virtue of the contractual nature of their work and their lesser cost to the businesses who hire them.

Clarification of the Term "Supervisor" for Purposes of Harassment: In addition to expanding the types of workers who are protected under FEHA's harassment provisions, the bill takes the important step of clarifying who are "supervisors" for purposes of the Act. Under FEHA, harassment of an employee or applicant by anyone other than an employer, agent or supervisor "is unlawful only if the employer, or its agents or supervisors, knows or should have known of the harassment and fails to take immediate and appropriate corrective action." (Government Code section 12940.)

To address the lack of a definition of "supervisor" in FEHA, this bill employs the reasonable definition used in the Labor Code in the Agricultural Labor Relations Act. That statute defines the term "supervisor" as:

> Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other

> employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment. (Labor Code section 1140.4(j).)

This common sense definition should help clarify for employers and employees alike, as well as for the courts, those individuals who are acting with supervisorial authority for purposes of the Fair Employment and Housing Act.

Reasonable Accommodations for Pregnant Employees: This bill also seeks to clarify and strengthen employer responsibilities for accommodating pregnant employees. The measure requires employers to provide reasonable and measured accommodations to pregnant employees not currently specified in FEHA. Currently, FEHA excuses employers from reasonable accommodation of pregnant employees if accommodation would impose an undue hardship. (Government Code section 12940(k).) Specifically, the Act defines "undue hardship" as:

> An action requiring significant difficulty or expense, when considered in light of the following factors: (1) the nature and cost of the accommodation needed, (2) the overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility, (3) the overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities, (4) the type of operations, including the composition, structure, and functions of the work force of the entity, and (5) the geographic separateness, administrative, or fiscal relationship of the facility or facilities. (Government Code section 12926(p).)

FEHA currently addresses pregnancy accommodation solely as the more burdensome duty to reasonably accommodate a pregnant employee by transferring her to less strenuous or hazardous duties for the duration of the disability so long as the employee asks. (Government Code section 12945(c)(2).) (California employers are not required, however, to meet the transfer requirements of FEHA by creating additional employment for pregnant employees that would not otherwise have been created, nor by discharging or transferring other employees with more seniority, or promoting other employees who are not qualified to "perform the job". (Id.))

Unfortunately, FEHA does not yet expressly permit less costly, and often more desirable and appropriate, accommodations for pregnant employees that fall short of job transfer. The proposed amendment to FEHA regarding pregnancy is intended to permit employers to allow pregnant employees to remain in their current positions for longer time periods without the need for transfer, while assuring that less costly and disruptive steps (such as simply permitting more frequent restroom breaks or rest periods) are taken for pregnant employees who do not want or need to be transferred from their current positions. Under the proposed amendment, the Fair Employment and Housing Commission will have the responsibility of adopting regulations to assist employers in determining appropriate types of accommodations for pregnant employees no longer limited to job transfer.

New Housing Discrimination Protections: This bill also clarifies that it is an unlawful housing practice for a housing owner to harass a tenant or prospective tenant on any of the bases protected under FEHA. This amendment is consistent with a recent state court of appeal decision, Brown v Smith (1997) 55 Cal.App. 4th 767, where the court held that while the housing side of FEHA does not mention the word "harassment", it is a variety of sex discrimination and therefore subject to the protections of FEHA. (Id. at 782.) In Brown, a tenant was subject to severe instances of sexual harassment by her landlord, who repeatedly pressured her for sexual relations in exchange for favorable rent. The appellate court clarified that even though FEHA does not expressly mention harassment in its housing discrimination proscriptions, the Act covers it as a form of prohibited discrimination. This bill eliminates the current statutory ambiguity noted by the court and adds the term "harassment" to that part of the Act. The bill also clarifies that the opportunity to seek, obtain, and hold housing free from discrimination is a civil right of equal import as that right already expressed regarding discrimination-free employment.

Prohibition on Genetic Testing: This legislation also clarifies that genetic testing is prohibited under FEHA. Current law, pursuant to legislation last year by Senator Johnston, SB 654 (Stats. 1998, Ch. 99), already prohibits discrimination on the basis of genetic characteristics. That provision expressly prohibits under FEHA employment discrimination against healthy individuals with a genetic predisposition for disease. However, it does not expressly state that employers may not obtain genetic information from employees or job applicants through genetic testing, and there is no statutory protection for employees whose employers conduct genetic testing at the workplace.

Last year, the American Civil Liberties Union (ACLU) submitted testimony to Congress on the growing need to protect the privacy of genetic information. The organization noted that it has already encountered the use of genetic information as the basis for discrimination both in employment settings and in the health insurance industry. It stated that in a 1996 Georgetown University study of 332 families belonging to genetic disease support groups, 22% of the respondents stated that they had knowingly been refused health insurance and 13% stated that they had knowingly been terminated from their jobs because of the perceived risks attributed to their genetic status. (Testimony Presented to the Senate Labor and Human Resources Committee, May 21, 1998, on file in the Judiciary Committee).

The ACLU also collected data about the growth of genetic testing in the workplace. It noted that the U.S. Department of Labor has found that the genetic testing in the workplace prohibited in this legislation is on the rise nationwide. In 1982 a federal government survey found that approximately 1.6% of surveyed companies -- more than 1,500 U.S. companies -- were using genetic testing for employment purposes. In a similar survey conducted by the American Management Association in 1997, that figure had risen to 6-10% of responding employers (well over 6,000 companies). Additionally, the Council for Responsible Genetics has documented hundreds of cases where healthy individuals have suffered insurance and workplace discrimination on the basis of genetic information.

Current statutory protections in the nation's discrimination laws are inadequate to prevent genetic discrimination. Over half of the states in this country still do not have any statutory protections against genetic discrimination. Even among those that do, such protections are not comprehensive; some states prohibit discrimination only in health insurance or in the workplace, or only for specific genetic traits. Federal protection is also limited. The most important such law concerning genetic discrimination

is the Americans with Disabilities Act (ADA). Although the ADA prohibits employers from discriminating against those with "physical or mental impairments which substantially limit a major life activity" (or those that have a record of or are regarded as having such an impairment), so long as their condition does not make them incapable of performing their job, it does not protect the privacy of employees, and does not prevent employers from obtaining genetic information; it only prevents them from using the information.

The Committee firmly believes that employment decisions should be made on the basis of an individual's ability to perform the job, not on the basis of private genetic information or generalizations about the groups to which the individual may belong. This bill therefore clarifies that genetic testing of employees and job applicants is prohibited under FEHA.

Conformity of Mental Disability Provisions With Physical Disability Standards: The bill eliminates the current discrepancy in FEHA between the Act's treatment of physical and mental disabilities. It provides that employers of five or more employees will now be subject to the Act's prohibition of discrimination on the basis of mental disabilities, as is already the case with respect to physical disabilities.

Currently, FEHA prohibits employment discrimination against individuals with physical disabilities, mental disabilities, or medical conditions. "Mental disability" is defined in the Act as any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. (Section 12926(k).) California courts have split over whether a mental disability for FEHA purposes requires that the mental disability substantially limit a "major life activity", as required by the ADA. Importantly for the purposes of this bill, only private employers of 25 or more employees, the State of California, and its municipalities and political subdivisions were subject to FEHA's provisions relating to mental disability until July 26, 1994. (Section 12940(l)(1).) Since then, private employers of 15 or more employees have been subject to liability for discrimination on the basis of mental disability. (Section 12926(d)(2), 12940(1)(2).)

The Committee believes this change is needed in FEHA because despite the need for the same protection afforded those with physical disabilities, FEHA's current employer size requirement means that qualified individuals with psychiatric disabilities who work for smaller employers -- those with five to fourteen employees – effectively have no legal recourse against disability-based termination, harassment or demotion. Further, qualified individuals with psychiatric disabilities have no access to basic accommodations such as time off for therapy, a leave of absence to address a health care crisis, a quieter work space, or periodic breaks to take medications.

The Committee is aware of the argument used when this provision was first adopted that asserted smaller employers do not have the resources to accommodate people with psychiatric conditions. Such concerns were the express basis for delaying coverage of working people with mental health disabilities until a study was completed by the Legislature by 1996. ("This study shall provide a basis for a recommendation ... concerning whether the hardships imposed upon businesses outweigh the benefits to persons with disabilities when the requirements of Title I of the [ADA] are extended to California employers of 5 to 14, inclusive, employees ... to include people with mental disabilities. . .." Section 12940.3.)

Although the study was apparently never completed by the Legislature, there have been other studies which analyze the costs of compliance with ADA requirements. According to the most comprehensive of these, the average cost of an accommodation for any disability is $45. Moreover, accommodations for individuals with mental disabilities are, according to this study, even more cost-effective. (See Peter David Blanck, Communicating the Americans with Disabilities Act, Transcending Compliance: 1996 Follow-up Report on Sears, Roebuck and Co. (Iowa City, Iowa, 1996), 38-41, 60, noting that successful and low-cost accommodations made to employees with psychiatric disabilities include shorter shifts, more consistent job duties, access to private work space, education of the supervisor, and flexible scheduling. Report on file with the Committee.)

In support of the merits of this amendment to FEHA, the Committee also notes that the Act already provides flexibility for employers depending upon their size and resources. As noted above, the "undue hardship" defense available to employers permits consideration of various factors, including "the number of persons employed at the facility," and "the overall financial resources of the facility" when determining the accommodation requirements of the Act. (Section 12926(p)(2).) In other words, if a particular accommodation were unduly costly or disruptive for a smaller employer, FEHA would not require the employer to undertake the accommodation. However, the objective of requiring equal protections for physical and mental disabilities would, under the proposed amendments in the bill, appropriately remain.

Clarification About "Perceived Characteristics" and Discrimination Based Upon One's "Association:" The bill clarifies that FEHA's protections against housing and employment discrimination, and Civil Code Section 51.5's protections against discrimination in boycotting, buying, selling, and trading, also cover discrimination based upon a victim's perceived membership in a particular protected class. It also amends Civil Code Section 51.5 to include the "refusal to contract with" as part of the statute's discrimination protections, and grants the Department of Fair Employment and Housing and the Fair Employment and Housing Commission jurisdiction over cases involving claimed violations of Section 51.5 of the Unruh Civil Rights Act. In addition, the bill clarifies that FEHA's protections against housing and employment discrimination cover associational rights as well, i.e., discrimination based upon perceptions about who one may be associating with will now be protected under the Act. Thus, for example, discrimination involving the improper firing of an African-American woman because she was dating a white man, or discrimination against a prospective renter because his friends are of a different racial background, appropriately would be brought within FEHA's protective umbrella.

Civil Action Available Against Those Receiving Taxpayer Funds: The legislation also clarifies that the prohibition against discrimination by agencies or entities receiving state funds is enforceable through a civil action for equitable relief. Under current law (subdivision (a) of Government Code section 11135), "No person in the State of California shall, on the basis of ethnic group identification, religion, age, sex, color, or disability, be unlawfully denied the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or receives any financial assistance from the state." Thus under this provision, entities undertaking programs or activities that are funded directly by the state, and entities that receive financial assistance from the state, may not unlawfully deny benefits or discriminate on the basis of any of the specified protected categories.

As required by current Government Code section 11139.5, the Secretary of the Health and Human Services, together with the Fair Employment and Housing Commission, have established regulations determining what persons are protected by these provisions and what practices are discriminatory. (See 22 Cal. Code Reg. section 98000 et. seq.). Although the Commission's exclusive authority to fashion remedies for discrimination is not limited by these provisions, there has been some confusion in the courts about the ability to bring a private cause of action to enforce the prohibition against discrimination by agencies or entities receiving state funds. At least one California court of appeal has held that there is no such right under Government Code section 11135. (Arriaga v. Loma Linda University (1992) 10 Cal.App. 4th 1556, 1561-1564. However, a panel of the Ninth Circuit Court of Appeal has held that such a private right is available. (Greater Los Angeles Council on Deafness v. Zolin (9th Cir. 1987) 812 F.2d 1103, 1113-1114.)

This bill does not settle that conflict about available enforcement remedies, but it does clarify that the prohibition against discrimination by agencies or entities receiving state funds is at least enforceable through a civil action for equitable relief. This will permit private individuals to seek judicial relief to force agencies or entities receiving state funds to halt their discriminatory practices.

Court Ordered Discrimination Prevention Training: This bill also clarifies that a court may require an employer found to be in violation of FEHA to conduct training of its employees, supervisors, and management regarding the requirements of the Act. FEHA currently authorizes a court to grant any relief normally available to courts in civil actions. In addition, the court may order any other relief in FEHA cases that, "in the judgment of the court, will effectuate" the purpose of the Act. (Government Code section 12965 (c)(3).) This bill simply clarifies that such relief may include "a requirement that the employer conduct training for all employees, supervisors, and management on the requirements of [FEHA], the rights and remedies of those who allege a violation of [the Act], and the employer's internal grievance procedures."

ARGUMENTS IN SUPPORT: The Fair Employment and Housing Commission, vested with the responsibility with enforcing FEHA, supports this bill's many features. The Commission supports the proposed increase from $50,000 to $150,000 in available damages under FEHA, noting that it does not favor a complete elimination of a cap on damages.

The American Civil Liberties Union also strongly supports the bill, writing that, taken together, the provisions in this legislation comprise one of the most substantial improvements in FEHA in many years.

The California Labor Federation, AFL-CIO, also writes in strong support of the bill, stating that the bill's clarifications of FEHA are "long overdue."

Equal Rights Advocates writes in support of the bill, commenting that the bill's increased harassment protections for contract workers, its pregnancy accommodation provisions, and its statutory definition of the term "supervisor" will all substantially further FEHA's anti-discrimination objectives.

The Employment Law Center of the Legal Aid Society of San Francisco writes in particular support of the bill's strengthened accommodation protections for individuals with mental disabilities. The organization writes:

> Millions of California adults live with psychiatric disorders, and face ignorance and prejudice that can lead to job loss and unemployment. Indeed, many with mental illnesses do not reveal their condition, and pursue their work lives with the stress of a hidden disability. Without equality and reasonable accommodation, many individuals with psychiatric disabilities are unnecessarily barred from the workplace in contravention of California's public policy of nondiscrimination and inclusion... Like individuals with HIV, seizure disorders and other stigmatized disabilities, individuals with mental health conditions are particularly vulnerable to on-the-job harassment and outright discrimination. Indeed, it remains distressingly common for employees to be demoted or discharged from employment shortly after disclosing their mental health condition, regardless of job performance.

ARGUMENTS IN OPPOSITION: The Capitol Resource Institute opposes this bill because it "would have negative impacts on citizens of conscience…funded by tax dollars." The organization asserts that "while [the bill] purports to promote tolerance is [sic] actually intolerant to many California residents."

The California Employment Law Council (CELC) writes in strong opposition to the bill, asserting the legislation is "really a potpourri of unrelated changes to various civil rights laws." The organization states that although many of the provisions in the bill are not objectionable, it does have serious concerns about several of the provisions. For example, CELC writes that the proposed amendments to Section 51. 5 of the Civil Code, which would permit enforcement by a civil action for equitable relief, "could be deemed applicable to the employment relationship, and to have totally overturned, at a stroke, the carefully crafted provisions of FEHA."

CELC also opposes the bill's: 1) definition of "supervisor" (stating that such a definition is unnecessary since case law already has adequately provided definition in this area); 2) expansion of harassment protections to protect contract workers; 3) clarification that genetic testing of employees and job applicants is prohibited under FEHA; 4) pregnancy accommodation provisions; 5) clarification of the court's authority to order discrimination prevention training; 6) cap on available damages under FEHA at $150,000, arguing that federal caps on damages ought to apply to both FEHA and private causes of action.

The Civil Justice Association of California, formerly the Association for California Tort Reform (ACTR), opposes the bill because of concerns that it will expand employer liability by giving contract workers "a new power to sue a business they are working for under contract." The organization also opposes the inclusion in FEHA of a definition of "supervisor" and the "tripling" of the available damages under FEHA from $50,000 to $150,000. It writes that "[a]t the time when California's economy is again healthy and growing," it is not the time to expand potential employer liability in the civil justice system.

The California Association of Realtors wrote the Committee not in opposition to the bill, but with the request it consider eliminating the proposed housing discrimination amendments in the bill.

RELATED PENDING LEGISLATION: AB 858 (Kuehl), prohibiting employers from requiring employees, as a condition of entering into an employment contract, from waiving various anti-discrimination provisions.

PRIOR PERTINENT LEGISLATION:

AB 310 of 1998 (Kuehl): Contained many of the provisions present in this legislation, including raising the available damages cap in FEHA, providing remedies for contract workers who suffer harassment in their workplace, prohibiting genetic testing, and new accommodation requirements for pregnant workers. Passed by the Legislature and vetoed by the Governor.

SB 1251 of 1998 (Calderon): Completely eliminated the $50,000 cap on damages available under FEHA and allowed prevailing parties in FEHA actions to collect expert witness fees as part of costs. Passed by the Assembly and subsequently amended into a bill pertaining to educational reform.

SB 654 of 1998, Stats. 1998, Ch. 99 (Johnston): Expressly prohibited employment discrimination (under the Fair Employment and Housing Act) against healthy individuals with a genetic predisposition for disease.

AB 658 of 1996 (Kuehl): Required reasonable accommodation of pregnant employees under FEHA to include options other than job transfer. Died in Assembly Labor and Employment Committee.

AB 713 of 1996 (Kuehl): Added contract workers to the list of individuals protected against harassment under FEHA. Died in Assembly Labor and Employment Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

California Fair Employment and Housing Commission
California Labor Federation, AFL-CIO
American Civil Liberties Union
Consumer Attorneys of California
Employment Law Center of the Legal Aid Society of San Francisco
Equal Rights Advocates
Attorney General's Office
Mexican American Legal Defense and Educational Fund

Opposition

Capitol Resource Institute
Civil Justice Association of California, formerly "ACTR"
California Employment Law Council

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